

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 02, 2021**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ANGELA W.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,<sup>2</sup>

Defendant.

No. 4:20-cv-5164-EFS

**ORDER GRANTING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION  
AND DENYING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION**

Plaintiff Angela W. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the record reveals that Plaintiff was more functionally impacted by her brain aneurysm in the years immediately following the aneurysm

---

<sup>1</sup> To protect the privacy of the social-security Plaintiff, the Court refers to her by first name and last initial or as "Plaintiff." *See* LCivR 5.2(c).

<sup>2</sup> On July 9, 2021, Ms. Kijakazi became the Acting Commissioner of Social Security. She is therefore substituted for Andrew Saul as Defendant. Fed. R. Civ. P. 25(d); 42 U.S.C. § 405(g).

1 rather than at the time of the administrative hearing, the ALJ erred by failing to  
 2 separately consider the evidence in closer proximity to the brain aneurysm as  
 3 compared to the evidence in closer proximity to the administrative hearing. This  
 4 error was harmful. On remand, the ALJ is to consider whether, at a minimum, a  
 5 closed period of disability is to be awarded. For the reasons set forth below, the  
 6 Court grants Plaintiff's Motion for Summary Judgment, ECF No. 18, and denies  
 7 the Commissioner's Motion for Summary Judgment, ECF No. 19.

### 8 **I. Five-Step Disability Determination**

9 A five-step sequential evaluation process is used to determine whether an  
 10 adult claimant is disabled.<sup>3</sup> Step one assesses whether the claimant is engaged in  
 11 substantial gainful activity.<sup>4</sup> If the claimant is engaged in substantial gainful  
 12 activity, benefits are denied.<sup>5</sup> If not, the disability evaluation proceeds to step two.<sup>6</sup>

13 Step two assesses whether the claimant has a medically severe impairment  
 14 or combination of impairments that significantly limit the claimant's physical or  
 15  
 16  
 17  
 18

---

19 <sup>3</sup> 20 C.F.R. § 404.1520(a).

20 <sup>4</sup> *Id.* § 404.1520(a)(4)(i).

21 <sup>5</sup> *Id.* § 404.1520(b).

22 <sup>6</sup> *Id.*

1 mental ability to do basic work activities.<sup>7</sup> If the claimant does not, benefits are  
2 denied.<sup>8</sup> If the claimant does, the disability evaluation proceeds to step three.<sup>9</sup>

3 Step three compares the claimant's impairment or combination of  
4 impairments to several recognized by the Commissioner as so severe as to preclude  
5 substantial gainful activity.<sup>10</sup> If an impairment or combination of impairments  
6 meets or equals one of the listed impairments, the claimant is conclusively  
7 presumed to be disabled.<sup>11</sup> If not, the disability evaluation proceeds to step four.

8 Step four assesses whether an impairment prevents the claimant from  
9 performing work she performed in the past by determining the claimant's residual  
10 functional capacity (RFC).<sup>12</sup> If the claimant can perform past work, benefits are  
11 denied.<sup>13</sup> If not, the disability evaluation proceeds to step five.

12 Step five, the final step, assesses whether the claimant can perform other  
13 substantial gainful work—work that exists in significant numbers in the national  
14

---

15  
16 <sup>7</sup> 20 C.F.R. § 404.1520(a)(4)(ii).

17 <sup>8</sup> *Id.* § 404.1520(c).

18 <sup>9</sup> *Id.*

19 <sup>10</sup> *Id.* § 404.1520(a)(4)(iii).

20 <sup>11</sup> *Id.* § 404.1520(d).

21 <sup>12</sup> *Id.* § 404.1520(a)(4)(iv).

22 <sup>13</sup> *Id.*

economy—considering the claimant’s RFC, age, education, and work experience.<sup>14</sup>  
 If so, benefits are denied. If not, benefits are granted.<sup>15</sup>

The claimant has the initial burden of establishing she is entitled to disability benefits under steps one through four.<sup>16</sup> At step five, the burden shifts to the Commissioner to show the claimant is not entitled to benefits.<sup>17</sup>

## II. Factual and Procedural Summary

Plaintiff filed a Title 2 application, alleging a disability onset date of October 17, 2012—the date on which she suffered a brain aneurysm.<sup>18</sup> Her claim was denied initially and on reconsideration.<sup>19</sup> An administrative hearing was held before Administrative Law Judge Stewart Stallings.<sup>20</sup> During the hearing, Plaintiff testified that she began part-time work (about 18.5 hours per week) about four months before the hearing because she financially needed to and that, even though her employer desired her to work more hours, she was physically unable to work

---

<sup>14</sup> 20 C.F.R. § 404.1520(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

<sup>15</sup> 20 C.F.R. § 404.1520(g).

<sup>16</sup> *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

<sup>17</sup> *Id.*

<sup>18</sup> AR 168–78.

<sup>19</sup> AR 102–08, 110–16.

<sup>20</sup> AR 34–62.

1 more hours.<sup>21</sup> She testified that due to the brain aneurysm, spinal impairments,  
 2 and other physical and mental impairments, she has difficulty remembering  
 3 things, stutters when she is nervous and stressed, has low back, neck, and leg pain,  
 4 has numbness in her hands after twenty minutes of use, gets anxious around  
 5 people, experiences fatigue due to medications, has balance difficulties, and suffers  
 6 headaches.<sup>22</sup> She also testified that she was able to work and did not have these  
 7 difficulties before her stroke.<sup>23</sup>

8 When denying Plaintiff's disability claim, the ALJ found:

- 9 • Step one: Plaintiff had not engaged in substantial gainful activity  
 10 since October 17, 2012, the alleged onset date, through her date last  
 11 insured of December 31, 2017.<sup>24</sup>
- 12 • Step two: Plaintiff had the following medically determinable severe  
 13 impairments: transient ischemic attack (TIA) with aneurysm in 2012,  
 14 lumbar and cervical degenerative disc disease, neuropathy, anxiety,  
 15 neurocognitive decline, and speech deficits.<sup>25</sup>

---

18 <sup>21</sup> AR 38–40, 47–48.

19 <sup>22</sup> AR 41–50.

20 <sup>23</sup> AR 50.

21 <sup>24</sup> AR 17.

22 <sup>25</sup> AR 17.

- Step three: Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments.<sup>26</sup>

- RFC: Plaintiff had the RFC to perform light work:

She could lift up to 20 pounds, lift or carry up to 10 pounds frequently. Stand or walk for approximately 6 hours per 8-hour workday, and sit for approximately 6 hours per 8-hour workday, with normal breaks. The claimant would have needed a sit/stand option, defined as change from a standing position to a sitting position, or vice-versa, every 30 minutes for 5 minutes while remaining at the workstation. A sit/stand at will option was acceptable as well. She could never climb ladders, ropes or scaffolds; occasionally climb ramps and stairs; occasionally stoop; and never crouch, kneel, or crawl. She could occasionally reach overhead, bilaterally. Frequently handle and finger. She would have needed to avoid all use of moving or dangerous machinery and all exposure to unprotected heights. The claimant would have needed low stress work, defined as no production pace conveyor belt type-work and a predictable work environment. Work that involved no more than occasional interaction with the public, coworkers, and supervisors.<sup>27</sup>

- Step four: Plaintiff was unable to perform past relevant work.<sup>28</sup>
- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could have performed work that existed in significant

---

<sup>26</sup> AR 18–19.

<sup>27</sup> AR 19–23.

<sup>28</sup> AR 23–24.

1 numbers in the national economy, such as electronics worker and  
2 marker.<sup>29</sup>

3 When assessing the medical-opinion evidence, the ALJ found:

- 4
- 5 • the examining opinion of N.K. Marks, Ph.D., and the reviewing  
6 opinions of Rita Flanagan, Ph.D., and Renee Eisenhauer, Ph.D.  
7 persuasive.
  - 8 • some portions of the examining opinions of James Wahl, Ph.D., and  
9 James Opara, M.D., somewhat persuasive and other portions not  
10 persuasive.
  - 11 • the reviewing opinions of Robert Hander, M.D., and Norman Staley,  
12 M.D., not persuasive.<sup>30</sup>

13 The ALJ also found Plaintiff's medically determinable impairments could  
14 reasonably be expected to cause some of the alleged symptoms, but her statements  
15 concerning the intensity, persistence, and limiting effects of those symptoms were  
16 not entirely consistent with the medical evidence and other evidence.<sup>31</sup>

---

17  
18  
19  
20 <sup>29</sup> AR 24–25.

21 <sup>30</sup> AR 22–23.

22 <sup>31</sup> AR 20–22.

1 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
2 which denied review.<sup>32</sup> Plaintiff timely appealed to this Court.<sup>33</sup>

### 3 III. Standard of Review

4 A district court's review of the Commissioner's final decision is limited.<sup>34</sup> The  
5 Commissioner's decision is set aside "only if it is not supported by substantial  
6 evidence or is based on legal error."<sup>35</sup> Substantial evidence is "more than a mere  
7 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
8 mind might accept as adequate to support a conclusion."<sup>36</sup> Moreover, because it is  
9 the role of the ALJ and not the Court to weigh conflicting evidence, the Court  
10 upholds the ALJ's findings "if they are supported by inferences reasonably drawn  
11 from the record."<sup>37</sup> The Court considers the entire record.<sup>38</sup>

---

12  
13 <sup>32</sup> AR 1–6.

14 <sup>33</sup> See 20 C.F.R. § 404.981.

15 <sup>34</sup> 42 U.S.C. § 405(g).

16 <sup>35</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

17 <sup>36</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

18 <sup>37</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

19 <sup>38</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must  
20 consider the entire record as a whole, weighing both the evidence that supports and  
21 the evidence that detracts from the Commissioner's conclusion," not simply the  
22 evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383,  
23



Further, the Court may not reverse an ALJ decision due to a harmless error.<sup>39</sup> An error is harmless “where it is inconsequential to the ultimate nondisability determination.”<sup>40</sup> The party appealing the ALJ’s decision generally bears the burden of establishing harm.<sup>41</sup>

#### IV. Analysis

##### A. Step Three (Listings): Plaintiff establishes consequential error.

Plaintiff contends the ALJ erred by 1) failing to consider whether Plaintiff’s impairments met or equaled Listings 11.04, 12.04, and 12.05, and 2) failing to find that Plaintiff’s impairments met or medically equaled Listings 1.04A, 12.02 and 12.06. As discussed below, the ALJ erred by failing to consider Listing 11.04.

If a claimant meets all of the listing criteria, she is considered disabled at step three. A claimant who does not meet the listing criteria may still be considered disabled at step three if her impairments medically equal a listed

---

386 (8th Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such evidence was not considered[.]”).

<sup>39</sup> *Molina*, 674 F.3d at 1111.

<sup>40</sup> *Id.* at 1115 (cleaned up).

<sup>41</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

1 impairment.<sup>42</sup> The ALJ is obligated to consider the relevant evidence to determine  
 2 whether a claimant's impairments meet or equal one of the specified impairments  
 3 set forth in the listings.<sup>43</sup> The ALJ need not recite the reasons for his step-three  
 4 determination under the listings portion of the decision so long as the relevant  
 5 evidence and underlying findings are discussed in the ALJ's decision.<sup>44</sup>

6 Here, the ALJ did not mention Listing 11.04, which applies to vascular  
 7 insult to the brain and requires:

- 8 A. Sensory or motor aphasia resulting in ineffective speech or  
 9 communication (see 11.00E1) persisting for at least 3 consecutive  
 10 months after the insult; or  
 11 B. Disorganization of motor function in two extremities  
 12 (see 11.00D1), resulting in an extreme limitation (see 11.00D2) in the  
 13 ability to stand up from a seated position, balance while standing or  
 14 walking, or use the upper extremities, persisting for at least 3  
 15 consecutive months after the insult; or  
 16 C. Marked limitation (see 11.00G2) in physical functioning  
 17 (see 11.00G3a) and in one of the following areas of mental functioning,  
 18 both persisting for at least 3 consecutive months after the insult:
- 19 1. Understanding, remembering, or applying information  
 20 (see 11.00G3b(i)); or
  - 21 2. Interacting with others (see 11.00G3b(ii)); or
  - 22 3. Concentrating, persisting, or maintaining pace  
 23 (see 11.00G3b(iii)); or
  4. Adapting or managing oneself (see 11.00G3b(iv)).

---

18 <sup>42</sup> Soc. Sec. Ruling 17-2p. *See also Sullivan v. Zebley*, 493 U.S. 521, 530 (1990)  
 19 (requiring a claimant to show that the impairment meets (or medically equals) all  
 20 of the specified medical criteria, not just some of the criteria).

21 <sup>43</sup> 20 C.F.R. § 404.1520(a)(4)(iii); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir.2001).

22 <sup>44</sup> *Lewis*, 236 F.3d at 513.

1           Given the medical record following Plaintiff's vascular insult to the brain in  
2           October 2012, the ALJ erred by not discussing Listing 11.04. The medical records  
3           in January 2013—three months after her brain aneurysm—reflect that her  
4           coordination was abnormal, she struggled expressing her thoughts, and her speech  
5           occasionally stalled although she was able to eventually find the words.<sup>45</sup> In  
6           February 2013, she experienced dizziness at her physical therapy sessions.<sup>46</sup> Then  
7           in March 2013, during her neuropsychological examination with Dr. Wahl, he  
8           noted that Plaintiff's "[s]peech was moderately dysarthric but there was minimal  
9           stuttering"<sup>47</sup> and:

10           Her test scores today suggested a significant decline in verbal  
11           functioning, especially concerning abstract reasoning skills,  
12           vocabulary, verbal attention and arithmetic. I would guess her current  
13           FSIQ represents a decline from previous levels of about 10 points. In  
14           addition to her verbal difficulties she also displayed slowed  
15           psychomotor speed, which is common in brain-injured patients.<sup>48</sup>

16           Although he opined that she was capable of engaging in appropriate social  
17           interaction and managing her own funds, he "suspect[ed] that her persistence,  
18

---

19           <sup>45</sup> AR 276–77.

20           <sup>46</sup> AR 940, 935, 933.

21           <sup>47</sup> AR 263.

22           <sup>48</sup> AR 264–65.

1 concentration and attention will be sporadically impaired for some time. Again, it  
2 is unknown whether this will improve, and if so to what extent.”<sup>49</sup>

3 The medical record clearly indicates that Plaintiff initially struggled with  
4 abnormal coordination, dizziness, weakness, speech, concentration, and attention  
5 due to her brain aneurysm. Then in 2016, about three years after the aneurysm,  
6 the medical record begins to indicate normal gait and infrequent speech challenges.  
7 Yet, a consultative psychodiagnostics evaluation in August 2017 with Dr. Marks  
8 reveals that Plaintiff continued to struggle with attention, focus, and switching  
9 from one task to another, even though she could take care of household tasks if  
10 given a sufficient amount of time to complete them.<sup>50</sup> On this record, the ALJ erred  
11 by not discussing Listing 11.04, particularly as to the period following the brain  
12 aneurysm.<sup>51</sup> This error was caused by the ALJ not separately considering  
13 Plaintiff’s functioning in the period immediately following the brain aneurysm from  
14 her functioning during the latter part of the alleged disability period. Instead of  
15 separately considering these periods, the ALJ used Plaintiff’s improvement during  
16 the alleged disability period as a basis to discount the medical opinions and  
17  
18  
19

---

20 <sup>49</sup> AR 265.

21 <sup>50</sup> AR 423–27.

22 <sup>51</sup> See *Smith v. Kijakazi*, --- F.4th ----, 2021 WL 4486998 at 4–6 (9th Cir. Oct. 1, 2021).  
23

1 Plaintiff's reported symptoms, thereby impacting the listings' analysis.<sup>52</sup> This error  
2 was consequential.

3 The ALJ's focus on Plaintiff's comparatively improved condition as of the  
4 date last insured permeated his entire listings' analysis. Therefore, the Court does  
5 not address Plaintiff's remaining listings' arguments.

6 **B. Medical Opinions: Plaintiff establishes consequential error.**

7 Plaintiff argues the ALJ erred by failing to fully incorporate Dr. Marks' and  
8 Dr. Flanagan's opinions into the RFC after finding them persuasive. As discussed  
9 below, the ALJ erred as to Dr. Marks' opinion.

10 1. Standard<sup>53</sup>

11 An ALJ must consider and evaluate the persuasiveness of all medical  
12 opinions or prior administrative medical findings.<sup>54</sup> The ALJ need not however  
13

---

14 <sup>52</sup> AR 22 ("Although the testing was indicative of cognitive decline shortly after her  
15 TIA and aneurysm, the evidence demonstrates improved cognitive functioning over  
16 time. Thus, the undersigned finds [Dr. Wahl's March 2013] neuropsychological  
17 report and testing is not representative of her level of functioning throughout the  
18 relevant period. Ultimately, the undersigned finds the consultative psychological  
19 report from August 2017 . . . to be more persuasive as it is a better reflection of the  
20 claimant's true functioning during the period at issue.").

21 <sup>53</sup> 20 C.F.R. § 404.1520c.

22 <sup>54</sup> *Id.* § 404.1520c(a), (b).  
23

1 “give any specific evidentiary weight” to a medical opinion.<sup>55</sup> The factors for  
2 evaluating the persuasiveness of medical opinions and prior administrative  
3 medical findings include, but are not limited to, supportability, consistency,  
4 relationship with the claimant, and specialization.<sup>56</sup> Supportability and consistency  
5 are the most important factors, and the ALJ is required to explain how both of  
6 these factors were considered:<sup>57</sup>

7 (1) Supportability. The more relevant the objective medical evidence  
8 and supporting explanations presented by a medical source are to  
9 support his or her medical opinion(s) or prior administrative medical  
10 finding(s), the more persuasive the medical opinions or prior  
11 administrative medical finding(s) will be.

12 (2) Consistency. The more consistent a medical opinion(s) or prior  
13 administrative medical finding(s) is with the evidence from other  
14 medical sources and nonmedical sources in the claim, the more

---

15 <sup>55</sup> Revisions to Rules, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R.  
16 § 404.1520c(a).

17 <sup>56</sup> *Id.* § 404.1520c(c)(1)–(5). When assessing the medical source’s relationship with  
18 the claimant, the ALJ is to consider the treatment length, frequency, purpose, and  
19 extent, and whether an examination was conducted. *Id.* The ALJ may also consider  
20 whether the medical source has familiarity with the other record evidence or an  
21 understanding of the disability program’s policies and evidentiary requirements.  
22 *Id.* § 404.1527(c)(6).

23 <sup>57</sup> *Id.* § 404.1520c(b)(2).

1           persuasive the medical opinion(s) or prior administrative medical  
2           finding(s) will be.<sup>58</sup>

3           Typically, the ALJ may, but is not required to, explain how the other factors were  
4           considered.<sup>59</sup>

5           2.     Dr. Marks

6           In August 2017, Dr. Marks completed a psychodiagnostics evaluation of  
7           Plaintiff and reviewed Dr. Wahl's 2013 neuropsychological screening.<sup>60</sup> Dr. Marks  
8           noted that Plaintiff's speech was slow and hesitant, she had some difficulty finding  
9           the words she was trying to use, she was anxious and depressed, her stream of  
10          mental activity was organized but slow, she was orientated, her fund of knowledge  
11          appeared to be poor, her cognitive abilities were estimated to be in the low average  
12          range, she showed fair concentration, persistence, and pace, her short-term, long-  
13          term, and working memory were intact, she exhibited abstract verbal reasoning,  
14          and her problem solving and judgment appeared to be intact although the

---

15  
16       <sup>58</sup> *Id.* § 404.1520c(c)(1)–(2).

17       <sup>59</sup> *Id.* § 404.1520c(b)(2). When two or more medical opinions or prior administrative  
18       findings “about the same issue are both equally well-supported . . . and consistent  
19       with the record . . . but are not exactly the same,” the ALJ is required to explain  
20       how “the other most persuasive factors in paragraphs (c)(3) through (c)(5)” were  
21       considered. *Id.* § 404.1520c(b)(3).

22       <sup>60</sup> AR 421–28.

1 information provided by her then-husband suggested that in actual life situations  
2 Plaintiff's judgment was poor and her problem solving weak. As for cognitive WMS-  
3 IV testing, Dr. Marks found that Plaintiff's poorest performance was for the  
4 Immediate Memory Index where she scored in the low average, as compared to her  
5 average scores for the other four Indexes. As compared to others her age, she was  
6 in the extremely low range for her Adaptive Behavior Assessment. For the Beck  
7 Depression System and the Beck Anxiety Inventory, Plaintiff scored in the  
8 moderate range. For Trail Making A, Plaintiff's results indicated mild to moderate  
9 impairment, and for Trail Making B, Plaintiff's results indicated significant to  
10 severe impairment.

11 Dr. Marks diagnosed Plaintiff with generalized anxiety disorder and major  
12 depressive disorder—moderate.<sup>61</sup> As to work limitations, Dr. Marks wrote, “testing  
13 suggest that [Plaintiff] may have some distractibility concerns in a work-related  
14 activity” and she “may experience some problems dealing with pressure in a  
15 competitive work setting due to her depression and anxiety.”<sup>62</sup> Although the test  
16 results indicated that Plaintiff may have some difficulty with simple tasks,  
17 Dr. Marks opined that Plaintiff would not have difficulty understanding, carrying  
18 out, and remembering either complex or one-two step instructions in a work  
19 setting. Rather, Dr. Marks found the challenge for Plaintiff was in her ability to  
20

---

21 <sup>61</sup> *Id.*

22 <sup>62</sup> AR 427.



1 sustain concentration and persist when switching from one task to another or with  
2 organizing and planning.<sup>63</sup> Dr. Marks opined that Plaintiff's prognosis was fair to  
3 good and that she would benefit from individual psychotherapy to address her  
4 depression and anxiety.<sup>64</sup>

5 The ALJ found Dr. Marks' opinion persuasive because "it is well supported  
6 by the psychodiagnostics interview, mental status exam, and WMS-IV testing" and  
7 that Dr. Marks' opinion "was consistent with the normal mental status  
8 examination findings in the counseling records."<sup>65</sup>

9 Plaintiff argues the ALJ erred by failing to incorporate Dr. Marks'  
10 persuasive opinion into the RFC, particularly her opinion that Plaintiff would have  
11 difficulty with simple tasks and would struggle with sustaining attention and  
12 focus. The Commissioner contends the ALJ did incorporate Dr. Marks' opinion into  
13 the RFC because it restricted Plaintiff to "low stress work, defined as no production  
14 pace conveyer belt type-work and a predictable work environment. Work that  
15 involved no more than occasional interaction with the public, coworkers, and  
16 supervisors."<sup>66</sup>

---

17  
18  
19 <sup>63</sup> AR 426–27.

20 <sup>64</sup> AR 426.

21 <sup>65</sup> AR 23.

22 <sup>66</sup> AR 19

1           The ALJ rationally incorporated Dr. Marks' opinion that Plaintiff "may  
2 experience some problems dealing with pressure in a competitive work setting due  
3 to her depression and anxiety" by limiting her to low stress work. However, the  
4 ALJ failed to incorporate Dr. Marks' opinion that Plaintiff may be distracted at  
5 work and therefore would have difficulty sustaining concentration and persisting  
6 in a work-related activity at a reasonable pace.<sup>67</sup> Contrary to the Commissioner's  
7 assertion that the ALJ incorporated this opined limitation into the RFC by  
8 restricting Plaintiff to work that involved no more than occasional interaction with  
9 the public, coworkers, and supervisors, this restriction did not resolve the area of  
10 concern for which Dr. Marks assessed the concentration and persistence limitation.  
11 For instance, whereas Dr. Marks found that Plaintiff *could* maintain effective  
12 social interaction on a consistent and independent basis, his opined concentration  
13 and persistence limitations were based on the Trail Making Part B test results, her  
14 extremely low Adaptive Behavior Assessment System-3 results, and overall  
15 testing, psychodiagnostics interview, and clinical observations.<sup>68</sup> Therefore, the  
16 RFC limiting Plaintiff to occasional social interaction did not sufficiently  
17 incorporate Dr. Marks' opinion that Plaintiff would have problems concentrating  
18 and persisting in a work-related activity at a reasonable pace.

---

21 <sup>67</sup> AR 427.

22 <sup>68</sup> AR 426.

1 By not meaningfully explaining how Dr. Marks' opinion was fully  
2 incorporated into the RFC, the ALJ erred. This error was consequential because a  
3 significant-to-severe impairment in the ability to sustain concentration and persist  
4 when switching from one task to another, or with organizing and planning, may be  
5 work preclusive, as the vocational expert testified that a person who is off task due  
6 to lapses in concentration, persistence, and pace greater than 10 percent will be  
7 precluded from competitive work.<sup>69</sup>

8 3. Dr. Flanagan

9 In September 2017, Dr. Flanagan reviewed the record.<sup>70</sup> She reviewed the  
10 medical evidence of record, diagnosed Plaintiff with generalized anxiety and major  
11 depression, and opined as to the B Criteria that Plaintiff was mildly limited in her  
12 abilities to understand, remember, or apply information; interact with others; and  
13 adapt or manage herself; and moderately limited in her ability to concentrate,  
14 persist, or maintain pace. As to the mental RFC assessment, Dr. Flanagan opined  
15 that Plaintiff was moderately limited in her ability to sustain attention and  
16 concentration for extended periods, as she would "experience occasional lapses in  
17 attention, attendance, and concentration, persistence, and pace due to mental  
18 health symptoms, but not at a level that precludes productive work activity."<sup>71</sup>

---

19  
20 <sup>69</sup> AR 55–57.

21 <sup>70</sup> AR 64–76.

22 <sup>71</sup> AR 74.

1           The ALJ found Dr. Flanagan’s opinion was persuasive because it was based  
2 on a thorough written summary of the longitudinal record up to the date of the  
3 assessment, the evidence relied on fully supported her opinion, it was consistent  
4 with the longitudinal record, which the ALJ found to include unremarkable mental  
5 status findings and minimal mental health treatment, and consistent with  
6 Plaintiff’s admitted ability to take care of her personal needs, drive, shop in stores,  
7 and manage her own finances.<sup>72</sup>

8           Plaintiff argues that, when Dr. Flanagan’s medical opinion is considered,  
9 along with the testimony of the vocational expert that occasional lapses in  
10 attention, concentration, and pace preclude competitive employment, the ALJ  
11 erred by not finding Plaintiff unable to sustain work. The ALJ did not err in this  
12 regard. Although Dr. Flanagan found that Plaintiff had difficulties sustaining  
13 concentration and persistence, Dr. Flanagan opined that Plaintiff could still  
14 complete a normal workday and workweek. Contrary to Plaintiff’s argument, there  
15 is no evidence that Dr. Flanagan defined “occasional” as meaning occurring up to  
16 one-third of the day. In this regard, Plaintiff relies on the vocational expert’s  
17 testimony. However, it was Plaintiff’s counsel who defined “occasional” as meaning  
18 one-third of the day in the question posed to the vocational expert:  
19  
20  
21

---

22       <sup>72</sup> AR 23.  
23

1           Q     Separately, if an individual had occasional, one-third  
2     of the day, lapses in attention and concentration, persistence  
3     and pace, could such an individual sustain competitive  
4     employment?

5           A     No.

6     Plaintiff's reliance on SSR 96-9p is also unavailing. That policy defines "occasional"  
7     for purposes of exertional limitations, not nonexertional limitations. Even if it did  
8     apply or was otherwise persuasive, SSR 96-9p provides a *ceiling*—not a floor—for  
9     what qualifies as "occasional" under its provision, stating the term means "from  
10    very little up to one-third of the time."<sup>73</sup> Moreover, there is no evidence that when  
11    writing his report Dr. Flanagan used the term "occasional" consistent with SSR 96-  
12    9p or counsel's assigned meaning in his question. Therefore, this specific challenge  
13    by Plaintiff to the ALJ's treatment of Dr. Flanagan's opinion is denied.

14    **C.     Borderline Age: Plaintiff fails to establish error.**

15           Plaintiff also argues the ALJ failed at step five to explain how Plaintiff's  
16    borderline age was considered. Here, the ALJ mentioned that Plaintiff was 54  
17    years old—an individual closely approaching advanced age—on the date last  
18    insured and then listed the evidentiary considerations he relied on as to why he did  
19  
20  
21

---

22    <sup>73</sup> SSR 96-6p at \*3, \*8.  
23

1 not treat Plaintiff as a person of advanced age. The ALJ complied with his legal  
2 requirements as to considering Plaintiff's borderline age.<sup>74</sup>

3 **D. Other Steps: The ALJ must reevaluate.**

4 As discussed above, the ALJ's focus on Plaintiff's general capacity—both as  
5 to her exertional and nonexertional abilities—over the entire period permeated the  
6 ALJ's analysis. This not only consequentially affected the ALJ's failure to discuss  
7 Listing 11.04 but also the ALJ's analysis of Plaintiff's symptom reports. Therefore,  
8 Plaintiff's other challenges to the ALJ's decision are not addressed, other than to  
9 mention that if the ALJ again discounts Plaintiff's reported symptoms, the ALJ  
10 must ensure he provides specific, clear, and convincing reasons for discounting  
11 each of Plaintiff's symptoms.<sup>75</sup> “[P]roviding a summary of medical evidence . . . is  
12 not the same as providing clear and convincing *reasons* for finding the claimant's  
13 symptom testimony not credible.”<sup>76</sup>

14 Here, although the ALJ supplemented his initial high-level reasons for  
15 discounting Plaintiff's symptom reports with a few specific reasons, the only  
16 specific reason for discounting Plaintiff's reported pain (low back, neck, and leg),  
17 headaches, and fatigue was that Plaintiff engaged in “high functioning activities of  
18

---

19  
20 <sup>74</sup> See *Lockwood v. Comm'r Soc. Sec. Admin*, 616 F.3d 1068, 1071 (9th Cir. 2010).

21 <sup>75</sup> *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

22 <sup>76</sup> *Lambert v. Saul*, 980 F.3d 1266, 1278 (9th Cir. 2020) (cleaned up).  
23

1 daily living.”<sup>77</sup> Moreover, as previously mentioned, the ALJ’s failure to separately  
2 consider the period of time following the brain aneurysm from the latter period  
3 spanned by the medical records, consequentially impacted the ALJ’s assessment of  
4 Plaintiff’s symptom reports.<sup>78</sup>

5 Finally, as to Plaintiff’s activities, the ALJ described them as the ability to  
6 “take care of personal needs such as showering and dressing,” having a driver’s  
7 license, driving, taking care of “household tasks such as sweeping, vacuuming,  
8 mopping, or doing laundry” although it took a significant amount of time to  
9 complete these household tasks, and shopping in stores if the store was not too  
10 busy.<sup>79</sup> The ALJ found these activities indicated that Plaintiff retained greater  
11 physical and mental functioning than she reported. These activities, however, can  
12 be done in less than two-hour intervals or with breaks. <sup>80</sup> Accordingly, on remand,  
13 if the ALJ relies on Plaintiff’s activities of daily living to discount her reported  
14 symptoms, the ALJ is to more clearly explain how these activities are inconsistent  
15 with her reported pain, headaches, and fatigue, or are consistent with the ability to  
16 sustain work.

---

17  
18  
19 <sup>77</sup> AR 22.

20 <sup>78</sup> See *Smith*, 2021 WL 4486998 at 4–5.

21 <sup>79</sup> AR 22.

22 <sup>80</sup> See *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001).

1 **E. Remand for further proceedings.**

2 Plaintiff submits remand for payment of benefits is warranted.

3 If the three-part credit-as-true analysis is satisfied, the decision whether to  
4 remand a case for additional evidence, or simply to award benefits, is within the  
5 Court's discretion.<sup>81</sup> Remand for further proceedings is the usual course, absent  
6 clear evidence from the record that a claimant is entitled to benefits and no further  
7 proceedings will be useful.<sup>82</sup>

8 Here, the ALJ erred by failing to provide legally sufficient reasons for failing  
9 to incorporate Dr. Marks' opinion that Plaintiff was significantly limited in her  
10 ability to persist, concentrate, and maintain attention. However, neither Dr. Marks  
11 nor the ALJ translated these limitations into specific amounts of time that Plaintiff  
12 would be off-task or absent from work. Therefore, even if this opinion is credited as  
13 true and considered along with the vocational expert's testimony that being off task  
14 more than 10 percent of the time precludes competitive employment,<sup>83</sup> it is not  
15 clear that the ALJ would be required to find Plaintiff disabled. Therefore, further  
16

---

17 <sup>81</sup> *Garrison v. Coleman*, 759 F.3d 995, 1020 (9th Cir. 2014); *Sprague v. Bowen*, 812  
18 F.2d 1226, 1232 (9th Cir. 1987).

19 <sup>82</sup> *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379  
20 F.3d 587, 595 (9th Cir. 2004) ("[T]he proper course, except in rare circumstances, is  
21 to remand to the agency for additional investigation or explanation.").

22 <sup>83</sup> AR 57.  
23



proceedings are necessary so that the ALJ can translate Dr. Marks' opined limitations into specific amounts of time off task or absent from work. Also on remand, based on Plaintiff's more severe symptoms following her brain aneurysm, the ALJ is to consider on remand whether, at a minimum, a closed period of disability is to be awarded.<sup>84</sup>

#### **F. Conclusion**

Accordingly, **IT IS HEREBY ORDERED:**

1. The case caption is to be **AMENDED** consistent with footnote 2.
2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **GRANTED**.
3. The Commissioner's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.
4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff **RESERVING** and **REMANDING** the matter to the Commissioner of

---

<sup>84</sup> Consistent with Dr. Wahl's and Dr. Marks' opinions, a clinician in October 2017 noted that Plaintiff's thought process was slow, she struggled to remember details at times, and she rambled at times. AR 883. Then by 2018 (after the date last insured), Plaintiff's psychotherapy, counseling, and medical management notes reflect that although she had family and financial stressors, her speech, attention, focus, insight, and judgment were appropriate to fair. AR 500–06, 517–75, 599, 603–05, 609–15, 622–52, 879–90. *But see* AR 588.<sup>84</sup>

1 Social Security for further proceedings pursuant to sentence four of 42  
2 U.S.C. § 405(g).

3 5. The case shall be **CLOSED**.

4 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and  
5 provide copies to all counsel.

6 **DATED** this 2<sup>nd</sup> day of November 2021.

7 

8 

---

EDWARD F. SHEA  
9 Senior United States District Judge